



STATE OF INDIANA

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May 30, 2018

Ms. Sali K. Falling
Vice President and General Counsel
Office of General Counsel
AD 216, Administration Bldg.
Ball State University
Muncie, IN 47306

Via email to sfalling@bsu.edu

Re: Informal Inquiry 18-INF-04; Applicants of Public Officials

Dear Ms. Falling,

Thank you for contacting my office for guidance in reference to the applications submitted to Ball State University declaring interest in membership on the Muncie Community School board. The fact of your inquiry demonstrates tremendous good faith and forethought in seeking my guidance and it is very well-received. Pursuant to Indiana Code section 5-14-4-10(5), I am pleased to offer the following response.

House Enrolled Act 1315 adds a new chapter to the Indiana Code, effective July 1, 2018, allowing Ball State University to adopt a resolution opting in to oversee aspects of Muncie Community Schools. Said resolution was thereby adopted on May 16, 2018 thus the new Indiana Code section 20-23-18-6(a)(2)(A) gives Ball State University the power to, among other things, appoint the members of the Muncie Community School Board.

Three pools of candidates are statutorily authorized to be appointed from nominees submitted to the University, to the Muncie City Council and the City of Muncie Mayor's Office. A public records request was submitted to Ball State seeking the names and applications for those seeking appointment. Your inquiry specifically addresses the question of whether the applications for membership on a governing body are public record.

Analysis

The Access to Public Records Act ("APRA") states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code § 5-14-3-1. Any person has the right to inspect and copy a public agency's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. Ind. Code § 5-14-3-3(a).

I am confident Ball State University recognizes the intent of the Indiana General Assembly in regard to the Access to Public Records Act and any discussion of public records begins with the presumption of disclosure. From there, exemptions are identified to exclude sensitive information from release, however, the Act as a whole is to be construed liberally in favor of disclosure. See Ind. Code § 5-14-3-1. To that end, every public record withheld must be accompanied by a statute allowing its exemption from disclosure requirements.

House Enrolled Act 1315 does not specifically identify an exemption from disclosure in its text. The University argues Indiana Code section 5-14-3-4 (b)(12) provides a mechanism for such an exemption. It provides that records specifically prepared for discussion or developed during discussion in an executive session may be withheld at the discretion of a public agency.

Notably, an executive session for considering applications for public official appointees is authorized by Indiana Code section 5-14-1.5-6.1(b)(10). In that session, a list of prospective appointees may be developed, applications considered, and a list of prospective appointees may be narrowed to no less than three individuals. Subsequently, interviews of candidates must be held in a public meeting. This executive session is entirely optional during the nomination and consideration process.

The University's argument is a curious one and one that, to my knowledge, is an issue of first impression for this office. "Records specifically prepared for discussion or developed during discussion in an executive session" is not a term that is further defined in Indiana Code. Therefore "[w]hen interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998).

The discretion to hold an executive session lies with a governing body. In this case, the governing body is the Ball State University Board of Trustees. It stands to reason that materials specifically developed for an executive session to consider candidates would include qualitative evaluation tools, personal notes by the Trustees appraising the candidates, or summaries used internally to scrutinize the submitted applications. Checklists, rankings, or scoring matrices would qualify, but these are materials prepared by the Board of Trustees.

Materials prepared by applicants for employment are not submitted specifically so that a governing body may enjoy the benefit of an executive session. They are simply submitted for consideration. The Trustees may use the applications as a vehicle taking them into an executive session but they are not deliberative material communicated to facilitate the meeting environment.

Turning then to the public policy reasons cited by the University, a main concern appears to be an expectation of privacy on the part of a candidate. The University is sensitive to undue embarrassment on the part of excluded candidates.

School boards are typically elected and names on those ballots are publically available as are those candidates for other municipal councils. The University fails to distinguish between declaring interest in an elected board versus an appointed one. Furthermore, being a public official requires a unique ability to withstand scrutiny and probing inquiry. Candidates throwing their hat in the ring for those positions would be well served on having the foresight they may not be chosen and that the elimination process may very well be public.

I appreciate the sensitivity to undue embarrassment but recognize that even in a pool of deserving candidates, there are a finite number of seats. Far be it from this office to enable the projection of shame on any individual expressing the mere willingness to serve. Whether candidates are chosen or eliminated, the act of declaring candidacy to a position of public trust is a noble and worthy exercise.

Similarly, it is well recognized that the selection of candidates is no easy task. The University has been granted the curatorship of a public school corporation. Undoubtedly scrutiny of difficult decisions will darken the doorstep of that stewardship time and again. The University has an opportunity via transparency to shine light on the quality of those decisions. If the University is interested in engaging the community to be a partner in this process – and I believe they do based upon prior statements – providing the applications is as good a start as any.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor